ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CA07-1066

March 5, 2008

DEBRA SMITH APPELLANT	AN APPEAL FROM FULTON COUNTY CIRCUIT COURT [NO. JN2005-42-3]
v.	HONORABLE STEPHEN CHOATE, CIRCUIT JUDGE
ARKANSAS DEPARTMENT OF HUMAN SERVICES APPELLEE	AFFIRMED

Debra Smith appeals from an order terminating her parental rights to JS, born August 30, 1996. She argues that the evidence was insufficient to warrant termination. We find no error and affirm the trial court's decision.

Before this case commenced, JS spent two years in foster care in Tennessee due to sexual abuse by his father, Kerry Smith. In early 2005, a Tennessee court returned JS to appellant after she divorced Smith. Appellant and JS then moved to Fulton County, Arkansas. The Tennessee court prohibited contact between JS and his father.

On September 27, 2005, the Arkansas Department of Human Services (DHS) took a seventy-two-hour hold on JS after receiving a report that the boy had been in contact with his father on a trip to Tennessee and Indiana *with appellant*. The Fulton County Circuit Court granted emergency custody and found probable cause for the removal. On December 19, 2005,

the court adjudicated JS dependent-neglected on the ground that appellant failed to protect him from the potential of abuse. The goal of the case was reunification, and appellant was ordered to comply with the DHS case plan.

Subsequent review and permanency-planning orders between April 2006 and February 2007 found appellant in compliance with the case plan, although one order noted that appellant had not been available for a caseworker's home visit. The goal of the case remained reunification.

On April 16, 2007, DHS filed a petition to terminate appellant's and Kerry Smith's parental rights, alleging numerous grounds.[1] The termination hearing was held on June 29, 2007, and the following evidence was adduced.

Social worker Melinda Fulton testified that not long after JS's intake to her clinic in August 2006, he was admitted to a facility called Youth Villages, where he stayed until May 15, 2007. As a result, Fulton did not see JS until June 8, 2007. At the time of the termination hearing, Fulton had met with JS five times, with appellant for two and one-half hours, and with other family members for brief periods. Fulton recommended that JS's contact with appellant be terminated and that he be placed in foster care or returned to in-patient care immediately.

Fulton's primary concern was appellant's family, which included six older children from a previous marriage. According to Fulton, the family was "a very enmeshed system" and "a

[1] Kerry Smith was named as a party in the proceedings below but did not appear at any hearings. His parental rights were terminated two months after appellant's, but he is not a party to this appeal. The record does not indicate why Smith's parental rights were not terminated in the Tennessee case.

very ill system," involving "everything from domestic violence to sexual abuse to incestuous behavior, to substance issues." Fulton indicated that JS's diagnosis at Youth Villages included post-traumatic stress disorder, and, according to her, the family members were triggers for him. She observed that, after JS was discharged from Youth Villages, he lived with appellant's older daughter, Amanda Wright, and her husband. Within thirty days, Fulton said, JS regressed and lost "a lot of the skills" that he had gained before he was discharged. Further, she said, appellant's visits with JS at Youth Villages resulted in "explosive" behavior by JS. Fulton testified that, when asked about visitation with his mother, JS said that he was afraid of her and that "she can't keep me safe."

Fulton also said that appellant indicated knowing that Kerry Smith had sexually abused her other children. Fulton stated that recurrent exposure of JS to Kerry Smith would be "completely disastrous" for the child and would "pretty much seal [his] fate." She acknowledged that appellant told her that she wanted what was in JS's best interest, expressed guilt and remorse over her inability to protect JS, and told her that she was not currently in contact with Kerry Smith and did not want to be. Additionally, Fulton recognized that appellant had complied with the case plan and had done everything that was asked of her. Yet, Fulton said, appellant simply was not capable of being JS's parent because JS could not succeed as long as he had continued exposure to any family member.

Family Service Worker Specialist Marcia Prewitt testified that despite appellant's compliance with the case plan, DHS recommended termination of parental rights based on appellant's "continued contact" with Kerry Smith. Prewitt said that "during the first part of this case" appellant continued to have telephone contact with Smith. The conversations included

appellant asking Smith to retrieve some of his things from her and Smith's inquiries regarding "how [JS] was doing and if she had gotten him back." Prewitt also said that appellant had worked on the "carnival circuit," where Smith was employed. Further, she said, in December 2006, appellant and Smith were in telephone contact and were "having conflict with one another," with Smith accusing appellant of trying to call him when he did not want her to do so and appellant wanting a restraining order against Smith. According to Prewitt, appellant "has continually went [sic] back to him at different points during the case," although she pointed to no specific instance of reconciliation, nor did she point to any evidence that JS had been exposed to Smith during the pendency of this case. However, Prewitt expressed concern that appellant had maintained a relationship with Smith in the past despite her other children having accused him of sexual abuse. She said, "that sets up a pattern . . . the likelihood that she will at some point possibly go back to him." Prewitt acknowledged that the case plan did not expressly prohibit appellant from being in contact with Smith, but she believed that the court indicated to appellant that she should not have contact with Smith. Further, Prewitt said, she had conversations with appellant to the effect that maintaining contact with Smith could affect whether appellant regained custody of JS.

Prewitt also testified that JS was adoptable, although she had no family set to adopt him at the moment. She said that JS's problems were "not as severe as other children that I've worked with or seen in our system that have been adopted." Prewitt could think of no further services that DHS could offer to enable reunification to occur.

Mary Ann Mernaugh, appellant's therapist, testified that appellant should regain custody of JS. Mernaugh saw appellant for twenty-five sessions beginning in April 2006. According to

her, appellant had a breakthrough during therapy and said, "I can't believe I let that happen," meaning Smith's abuse of JS. Mernaugh said that appellant accepted the fact that she had married a pedophile, and Mernaugh said that appellant had "total disgust" for him. Mernaugh believed that appellant had now severed her ties with Smith and that appellant would protect JS from Smith. According to her, appellant loved JS very much and told Mernaugh that she would do whatever it took to get JS back, "including divorcing [Smith]." Mernaugh understood that appellant and Smith's divorce took place during the period of counseling and that appellant's conversations with Smith in December 2006 were to work out the details of their divorce, such as who would file for divorce and who would bear the expense of it.

Appellant testified that she wanted Kerry Smith's parental rights terminated and that she would do "whatever it takes 100 percent" to have JS returned to her. She said that she objected to her parental rights being terminated because she and JS had not had adequate counseling together—she believed that they had around a dozen sessions during this case—but she also testified that she and JS had counseling during the time he was in foster care in Tennessee. Appellant said that she did not believe "much came out of that counseling." Appellant also testified that she did not divorce Smith during her therapy with Mernaugh but was divorced from him "before I left Tennessee." She said that divorcing Smith "was the only way I got [JS] back from the State of Tennessee." According to her, the conversations she had with Smith during this case were not about who was going to pay for the divorce but about "what of his stuff he was gonna get and what I was gonna get rid of."

Appellant was questioned about her other children and said that her daughter Amanda, now age twenty-two, wrote to appellant before appellant married Kerry Smith and told her

that Smith had molested her. Amanda told appellant the same thing after appellant moved back to Arkansas.

On July 18, 2007, the court entered an order terminating appellant's parental rights. The court found that, despite appellant's compliance with the case plan, termination was in JS's best interest. The grounds for termination included that JS was adjudicated dependent-neglected and continued out of appellant's custody for over twelve months and, despite a meaningful effort by DHS to rehabilitate the home and correct the conditions that caused removal, appellant had not remedied the conditions; that other factors or issues arose subsequent to filing the original dependency-neglect petition that demonstrated a return of JS to appellant was contrary to his health, safety, or welfare and, despite the offer of appropriate family services, appellant has manifested an incapacity or indifference to remedy the subsequent issues or factors; and that appellant subjected JS to aggravated circumstances in that there was little likelihood that continued services to the family would result in successful reunification. Appellant filed a timely notice of appeal and argues that there was insufficient evidence to support the termination of her parental rights.

Our review in termination-of-parental-rights cases is de novo. *Yarborough v. Ark. Dep't of Human Servs.*, 96 Ark. App. 247, 240 S.W.3d 626 (2006). Termination of parental rights is an extreme remedy and in derogation of the natural rights of parents. *Kight v. Ark. Dep't of Human Servs.*, 94 Ark. App. 400, 231 S.W.3d 103 (2006). However, parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Id.* An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence that termination is in the best interest of the child and of one or more statutory

grounds. Ark. Code Ann. § 9-27-341(b)(3) (Supp. 2007). When the burden of proving a disputed fact is by clear and convincing evidence, the appellate inquiry is whether the trial court's finding that the disputed fact was proven by clear and convincing evidence is clearly erroneous, giving due regard to the opportunity of the circuit court to judge the credibility of the witnesses. *Yarborough*, *supra*. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Smith v. Ark. Dep't of Human Servs.*, ___ Ark. App. ___, ___ S.W.3d ___ (Oct. 3, 2007).

The evidence reveals that in early 2005, appellant regained custody of JS in Tennessee after the child had been in foster care for two years due to sexual abuse by Kerry Smith. Appellant and JS received counseling during this time and, according to appellant, she was required to divorce Smith as a condition of regaining custody of JS. Yet, within months, appellant violated the Tennessee court's order and every tenet of sound parenting by re-exposing her child to the man who had sexually abused him. Appellant acknowledges her past failures to "accept the reality that her husband, JS's father, was a pedophile who sexually abused JS and her other children" and to "take the appropriate and necessary steps to protect her son and provide him with a stable home." However, she argues that she has now undergone intensive therapy and accepts "her ex-husband's pedophilia and its impact on JS."

The extent of appellant's rehabilitation presented a credibility question for the court. Appellant's therapist testified that appellant experienced a breakthrough and should regain custody of JS. Yet, the therapist's testimony was based, in part, on the mistaken premise that appellant was so committed that she would divorce Smith if necessary to get JS back. In fact,

unbeknownst to the therapist, the couple was already divorced before appellant's therapy began. Additionally, the trial court was not required to believe appellant's representation that, after undergoing therapy, she understood the need to protect JS from Smith. A fact-finder is not required to accept, as undisputed, evidence from an interested party. *See Laird v. Weigh Sys.*, 98 Ark. App. 393, ___ S.W.3d ___ (2007).

There were also troubling indications that appellant maintained contact with Smith throughout much of the case. While appellant characterized these contacts as superficial discussions regarding the exchange of property, DHS witness Marcia Prewitt testified to more substantive communications. Further, there was evidence that appellant was not consistent in explaining her contacts with Smith. Appellant's therapist testified that appellant told her that the December 2006 conversations involved who would file and pay for the parties' impending divorce. But, as mentioned earlier, the divorce occurred more than a year earlier. Moreover, appellant showed a tendency in the past to disbelieve that Smith molested her children; she went forward with her relationship with Smith in the face of a letter from her daughter that Smith had molested her and in defiance of a court order prohibiting Smith's contact with JS. Given these facts, it is understandable that appellant's continued communication with Smith informed the court's decision to terminate parental rights. The possibility of JS's re-exposure to Smith was too great and the potential for harm too dire. JS told Melinda Fulton that he was afraid of appellant and that she could not keep him safe. Fulton testified that JS's re-exposure to Smith would be "completely disastrous" and would "pretty much seal [his] fate."

Appellant also points out that she followed the case plan and did all that was asked of her. Completion of the case plan is not determinative on the question of whether parental

rights should be terminated. *Wright v. Ark. Dep't of Human Servs.*, 83 Ark. App. 1, 115 S.W.3d 332 (2003). What matters is whether the parent's completion of the case plan achieved the intended result of making the parent capable of caring for her child. *Id.*

Based on our review of the evidence, we cannot say that the trial court clearly erred in determining that appellant was not capable of caring for JS. We hold that termination was in JS's best interest and that at least one statutory ground was proved by clear and convincing evidence. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(*a*)(*3*)(*A*) (the parent subjected the child to aggravating circumstances and there is little likelihood that continued services to the family would result in reunification).

Appellant also argues that the court made no finding that JS was likely to be adopted. In assessing the best interest of the child, the trial court must consider the likelihood that the child will be adopted. Ark. Code Ann. § 9-27-341(b)(3)(A)(i) (Supp. 2007). However, the fact that the court must *consider* the likelihood of adoption does not mean that such likelihood must be proved by clear and convincing evidence. *See McFarland v. Ark. Dep't of Human Servs.*, 91 Ark. App. 323, 210 S.W.3d 143 (2005). Rather, after consideration of all factors, the evidence must be clear and convincing that the termination is in the best interest of the child. *Id.* In this case, there was evidence that JS was adoptable. The trial court presumably considered all the evidence before it, and, based on our review of the proof as a whole, the court did not clearly err in finding that termination was in JS's best interest.

Affirmed.

VAUGHT and BAKER, JJ., agree.